United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

To be argued by
Jerome F. O'Neill

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 74-2602

RALPH EDWARD BALDWIN

Petitioner-Appellant

v.

MAJOR GENERAL REGINALD M. CRAM, Adjutant General, National Guard of the United States; BRIGADIER GENERAL PHILLIP A. ALLICON; "JOHN DOE" COMMANDING OFFICER, FORT DIX, NEW JERSEY; ROBERT F. FROEHLKE, Secretary of the Army of the United States; MELVIN LAIRD, Secretary of Defense of the United States; and Lt. General CLAIRE R. HUTCHIN, JR., or His Successor as Commanding General, First United States Army District of the United States.

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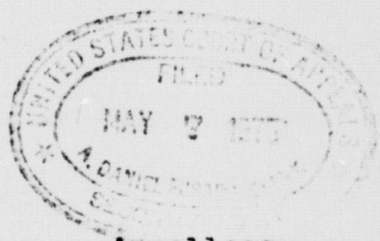

Appellees

Appeal from the United States District Court for the District of Vermont

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

PRELIMINARY STATEMENT

Ralph Baldwin appeals from an order of the United States District Court for the District of Vermont, the Honorable Albert W. Coffrin, United States District Judge, granting the Government's motion to dismiss. (A 4).*

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* "A" refers to the Appendix.

Ralph Edward Baldwin filed an application for a writ of habeas corpus in the United States District Court for the District of Vermont on December 8, 1972. Baldwin sought a temporary restraining order to prevent the Army from requiring him to report to active duty at Fort Dix, New Jersey on December 11, 1972. The District Court granted the motion for a temporary restraining order and the temporary restraining order subsequently was continued in effect by the stipulation of counsel pending the outcome of the case.

The Government filed a motion for summary judgment on September 14, 1973 and a subsequent motion to dismiss on April 15, 1974. Plaintiff filed a memorandum in opposition to the Government motions on April 29, 1974. The Court filed an order and opinion on September 12, 1974 granting the Government's motion to dismiss and dissolving the temporary restraining order.

STATEMENT OF FACTS

Ralph Baldwin enlisted in the Vermont Army National Guard in December, 1971 for a six year period. (A 4). The Army ordered Baldwin to report to Fort Leonard Wood, Missouri in May, 1972 for six months of active duty training. (A 4). Baldwin reported as ordered but went absent without leave in June, 1972. In July, 1972 Baldwin voluntarily returned to the custody of the military at Fort Devens, Massachusetts and subsequently was returned to Fort Leonard Wood. Baldwin sought a discharge from the military upon his return to Fort Leonard Wood on the grounds of unsuitability and unfitness and submitted letters from civilian doctors in support of this request. (A 5). Baldwin's commanding officer requested a psychiatric evaluation of him and this evaluation was performed. Baldwin was not informed whether he would receive a discharge before he went AWOL on August 18, 1972. Following this departure from the military, Baldwin was returned to the control of the Vermont Army National Guard and was processed as an unsatisfactory participant in the Reserve Enlistment Program and as such received orders to report to Fort

Dix, New Jersey on December 11, 1972 for a period of twenty-two months and ten days of active duty. (A 5).

I. THE DISTRICT COURT WAS CORRECT IN GRANTING THE GOVERNMENT'S MOTION TO DISMISS RATHER THAN TREATING IT AS A MOTION FOR SUMMARY JUDGMENT.

The Government initially moved for summary judgment on September 14, 1974, (A. 2, 45 - 55) however, when it became apparent that there were factual issues to be resolved, the Government filed a motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted under Rule 12(b)(1), (6). (A 56). The memorandum of points and authorities submitted by the Government in support of its summary judgment motion was incorporated by reference, however, the appendices, which included parts of plaintiff's military records and several affidavits, were not. (A 57).

The motion to dismiss and supporting memorandum indicated that the purpose of the motion was to enable the Court to rule on the Rule 12 issues raised by the Government without the necessity for any factual findings. (A 56 - 57).

The District Court examined both Government motions, but found it unnecessary to rule on the Government's motion for summary judgment in view of its ruling on the motion to dismiss. (A 3). Further, while it is clear the Court believed Baldwin did not have standing to

complain of a failure by the Army to discharge him, (A 3 - 9) the Court's conclusion was limited to finding that it lacked jurisdiction. (A 9).

Plaintiff contends that the Government's motion to dismiss should have been treated as a motion for summary judgment since the Court considered material outside the pleadings in ruling on the 12(b)(6) motion. The difficulty with this position is that there is no showing anywhere in the record, nor in the Court's opinion, which suggests it relied upon material outside the pleadings. Even if the Court had considered material outside the pleadings, the conversion of a motion to dismiss to a motion for summary judgment takes place only when the Court's decision is based upon subsection (6), failure to state a claim upon which relief can be granted.

The validity of Baldwin's claim in this respect is further undercut by the Court's own enunciation of the standard it was applying: "the standard to be applied in ruling on a motion to dismiss is whether the plaintiff can prove any set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45 - 46 (1957); Blair v. Rockefeller, 469 F.2d 641, 642 (2d Cir. 1972)." (A 6 - 7).

The District Court did not consider matters outside the pleadings in ruling on the motion to dismiss and as such was not required to treat the motion to dismiss as a motion for summary judgment.

II. THE DISTRICT COURT CORRECTLY DECIDED THAT IT LACKED SUBJECT MATTER JURISDICTION OVER PLAINTIFF'S CLAIM THAT HE WAS ENTITLED TO DISCHARGE.

AR 635-212* states in the first paragraph under the caption "Purpose" that the regulation "establishes policy and provides procedures and guidance for eliminating enlisted personnel who are found to be unfit or unsuitable for further military service." (A 13). The regulation further states in the third paragraph under the delineation "Policy" that the Army may under certain circumstances take action to separate individuals for unfitness or unsuitability. The criteria clearly are not those intended to benefit the individual, such as personal hardship, but provide for discharge for such reasons as the inability of the Army to train the individual to be a satisfactory soldier, the person is not amenable to rehabilitative measures or does not meet military medical standards. (A 13). There are no provisions in the regulation for an individual to petition

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* Plaintiff relied incorrectly in his original pleadings on AR 135-78, a regulation similar to AR 635-212 and applicable to reservists. Plaintiff amended his complaint to correct this defect. (A 6).

his commander to begin proceedings under the regulation, nor is there a form which an individual can fill out to initiate proceedings. This is in direct contrast to such regulations as those governing conscientious objectors which specifically provide for a method by which the individual may apply for discharge.

Even to the extent that the Army begins to process an individual under this regulation, there is no requirement that it continue the proceedings to an ultimate decision. Nor does the regulation provide for an individual who has been denied discharge at one level of command to appeal to the next higher level of command which could authorize his discharge. The Government suggests therefore that the regulation is clear on its face in providing that this regulation is for the benefit of the Army and not the individual. As such an individual soldier has no right to require that the Army discharge him under this regulation. The regulation also does not contain any requirement that the Army continue the processing of an individual even after it has initiated such action.

Even to the extent that there was an obligation to process an individual for discharge, the Army was not

in a position to continue to process Baldwin for discharge after he was referred for psychiatric consultation. Baldwin was returned to Fort Leonard Wood, Missouri on July 17, 1972, after being absent without leave, and sought a discharge on grounds of unsuitability and unfitness. (A 34). He received a psychiatric evaluation but went AWOL again on August 18, 1972. (A 35). There is no allegation that Baldwin inquired further following the psychiatric evaluation whether he would receive a discharge. It is entirely conceivable under these circumstances that if Baldwin had remained in military control that he would have received a discharge under AR 635-212. The Army could not continue to process Baldwin for discharge under AR 635-212 when he was absent without leave since he was in an illegal status and could not be discharged while in such a status for obvious reasons. Further, AR 635-212 provides an individual with significant procedural protections against discharge by the Army, protections which Baldwin could not be afforded while he remained in an AWOL status.

Plaintiff further argues that the Army must follow its own regulations, and while this certainly is true in most contexts, plaintiff fails to even show how

the Army has violated its regulations. Plaintiff suggests that the Army's wrongdoing consisted of failing to continue to process Baldwin for discharge and not affording Baldwin certain procedural rights under AR 635-212. (A 34 - 35). However, the lack of any claim that the Army was not willing to afford Baldwin these procedural rights as well as his AWOL status* lays to rest any argument that the Army violated AR 635-212 in this respect. Further, the regulation in no way requires that the Army initiate proceedings or continue it forward once initiated. Plaintiff has failed however to even allege in his application for a writ of habeas corpus that processing under these regulations was in fact initiated but rather states only that Baldwin was referred for psychiatric consultation. (A 34).

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* As noted earlier, it is entirely possible that if Baldwin returns to Army control that he will be processed for discharge under AR 635-212. However, this is not possible while he remains in an AWOL status. Baldwin has the right to request and receive a full physical and mental examination upon reporting to the Army (AR 135-91, ¶15), and the Army has the right to require him to report to an Army installation to obtain it. Karpinski v. Resor, 419 F.2d 531 (3d Cir. 1969). See Keister v. Resor, 462 F.2d 471 (3d Cir. 1972); Jolicoeur v. Laird, 344 F. Supp. 1125 (D. Minn.), aff'd, 462 F.2d 1234 (8th Cir. 1972).

Two Circuit Courts of Appeal have examined the central issue raised by the plaintiff here and have concluded in both instances that the courts do not have subject matter jurisdiction to review the Army's failure to discharge an individual under AR 635-212. In Silverthorne v. Laird, 341 F. Supp. 443 (W.D. Tex.), aff'd, 460 F.2d 1175 (5th Cir. 1972) plaintiff sought a writ of habeas corpus, claiming as his first grant of relief that he was a conscientious objector, and as his second grant that he was unsuitable for military service and should be discharged under AR 635-212. Silverthorne had been sent by his company commander for psychiatric interview and evaluation for possible elimination from the Army under AR 635-212.*

The psychiatrist recommended administrative separation on the ground of unsuitability but Silverthorne's commander took no further action to discharge him. This is similar to the present situation, although Baldwin

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* This action bore no direct relationship to the conscientious objector application and the Court considered both grounds for relief separately.

might have been processed had he not gone AWOL. The Court specifically found that Silverthorne had no right to request discharge under AR 635-212 and concluded that the regulation is for the purpose of enabling the Army to purge itself of undesirable and unproductive soldiers. 341 F. Supp. at 445 - 46. The Court noted in reaching its conclusion that the Army is under no duty to follow the psychiatrist's recommendations and that judicial review is not available, discharge here being a discretionary function with the military. Id. at 446. The Court elucidated the logic behind its position as follows: "This court would hold itself powerless to review a commander's decision as to whether a soldier is fit and suitable for continued military service. It is difficult to imagine a determination less appropriate for the courts or more appropriate for the Army. '. . . Judges are not given the task of running the Army.' Orloff v. Willoughby, 345 U.S. 83, 93 - 94, 73 S. Ct. 534, 540, 97 L. Ed. 842." The Fifth Circuit affirmed the decision of the district court, and in doing so specifically contrasted AR 635-212 to regulations applicable to conscientious objectors to illustrate that while certain regulations are for the benefit of the soldier, the

provisions of AR 635-212 are specifically for the benefit of the Army. Silverthorne v. Laird, 460 F.2d 1175, 1186 (5th Cir. 1972). The Court found that the company commander had in fact initiated the proceedings, but that even after receiving the recommendation of discharge from the psychiatrist he was not required to proceed any furhter. The Court held that a commander "may in the exercise of his judgment choose to let the matter come to rest, even in the face of a psychiatrist recommendation of discharge." Id. at 86. The Court concluded that its power in this situation was limited to requiring the Army to comply with the miniterial duties enumerated in AR 635-212, such as insuring that the soldier be provided with counsel. Id.

In Allgood v. Keenan, 470 F.2d 1071 (9th Cir. 1972), the plaintiff absented himself without leave for six weeks. Upon his return to the military he was examined by a psychiatrist who found him to be basically unsuitable for military service and who recommended he be discharged under AR 635-212. Id. at 1072. Allgood was not so discharged however and instead was court martialed. Following his court martial Allgood again went AWOL and

following his apprehension the investigating officer recommended that Allgood be discharged from the Army without court martial. Id. Another psychiatri[illegible] examination was performed and the second psych[illegible]rist also recommended discharge under AR 635-212. Id. at 1073. Allgood himself requested discharge in lieu of court martial, as allowed by AR 635-200, but the Army declined to discharge him under AR 635-212.

Allgood filed a petition for a writ of habeas corpus, alleging that the Army's refusal to discharge him was arbitrary, unreasonable and without a basis in fact. Id. The District Court granted the requested writ, Allgood v. Keenan, 2 SSLR 3145 (N.D. Cal. 1969). The Ninth Circuit reversed the District Court, however, and found that the District Court had no jurisdiction. Allgood v. Keenan, 470 F.2d 1071 (9th Cir. 1972).

The Court noted that not all military regulations exist for the benefit of the soldier or grant the soldier the right to compel the military to act and concluded that it was without power to review the exercise of discretion by the Army under AR 635-212. Id. at 1073. The Court specifically found the regulation existed for the benefit of the Army and did not provide for a request

by a soldier for his own discharge. Further, the Court held that the Army was not required to initiate discharge proceedings nor to continue proceedings once initiated, despite the recommendations of military consultants. Id. at 1074.

A similar conclusion was reached in Palermo v. Laird, 72 Civ. 2785 (S.D.N.Y., Nov. 14, 1972) in which Judge Metzner dealt with the analagous regulations applicable to reservists, AR 135-178, and concluded that the individual concerned may not initiate discharge proceedings on the ground of unsuitability or unfitness.

Patterson v. Stancliff, 330 F. Supp. 110 (D. Vt. 1971) is in no way contrary to the above cases. The Court in Patterson simply ordered the Army to either discharge the individual or refuse to do so for reasons set out in the regulations. The facts in Patterson show that the entire chain of command recommended that he be discharged and the Army area commander then refused to accept the recommendation for reasons utterly unrelated to AR 135-178. Id. at 114. None of Private Baldwin's commanders had even initiated action to discharge him, much less recommended his discharge. Further, the conclusions reached by the courts in Allgood and Silverthorne seemed to be contrary to the conclusion of the

court in Patterson. The court in Silverthorne distinguished Patterson factually, but in addition very clearly was of the view that it was incorrect. See Silverthorne v. Laird, 460 F.2d 1175, 1187 n. 10 (5th Cir. 1972).

The District Court correctly found that it lacked subject matter jurisdiction.

III. PLAINTIFF LACKS STANDING TO CONTEST ANY FAILURE BY THE ARMY TO FOLLOW AR 635-212.

Plaintiff seems to suggest that the District Court ruled specifically that he lacked standing to contest any violation of AR 635-212. An examination of the District Court opinion fails to suggest any violation of AR 635-212 by the Army, and further does not hold specifically that Baldwin lacks standing. However, AR 635-212 has been specifically found by the courts which have considered it to be for the benefit of the military and not the individual and as such the individual has no standing to contest any failure by the Army to discharge him under the regulation. Allgood v. Keenan, 470 F.2d 1071, 1073 - 74 (9th Cir. 1972); Silverthorne v. Laird, 460 F.2d 1175, 1186 (5th Cir. 1972).

CONCLUSION

The decision of the District Court should be affirmed.

Respectfully submitted,

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the District of Vermont,
Attorney for the United
States of America

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May 5, 1975

May 6, 1975

Honorable A. Daniel Fusaro
Clerk, U.S. Court of Appeals
for the Second Circuit
1702 U.S. Courthouse - Foley Square
New York, New York 10007

Re: BALDWIN v. CRAM, et al.
C/A Docket No. 74-2602

Dear Mr. Fusaro:

Enclosed for filing are 25 copies of the brief for the United States in the above-captioned case.

Two copies of this brief have been served upon Mary Just Skinner, Esq., attorney for Mr. Baldwin.

Sincerely yours,

GEORGE W. F. COOK
United States Attorney

By:
JEROME F. O'NEILL
Assistant U. S. Attorney

Enclosures

JFO'N/sm